"REPORTABLE"

* **HIGH COURT OF DELHI AT NEW DELHI**

\+ **IA No. 3678/07 & CS (OS) No. 2263/2006**

Date of decision : November 19th 2007

\# SANDEEP BATRA ..... PLAINTIFF

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Through : Mr. Tigar Singh, Advocate
Mr. Manmeet Singh, Advocate

Versus

$ GE CAPITAL SERVICES INDIA .....DEFENDANT

^ *Through* : Mr. Sohail Dutt, Advocate
Mr. Ram Gupta, Advocate

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

(1) Whether reporters of local paper may be allowed to see the judgment?

(2) To be referred to the reporter or not? YES

(3) Whether the judgment should be reported in the Digest ? YES

ARUNA SURESH, J.

1. Present application has been filed by the defendant under Order 7 Rule 11 read with Section 11, Order 2 Rule 2 Code of Civil Procedure (hereinafter referred to as CPC) for rejection of the plaint. The facts giving rise to the present case are that the plaintiff filed a suit for declaration, permanent and mandatory injunction challenging his termination by the defendant company

vide letter dated 11.8.2000 before the Civil Judge, Tis Hazari Court, Delhi. In the said suit, declaration was sought that the said letter be declared bad in law and by way of mandatory injunction he sought direction to be issued to the defendant to reinstate the plaintiff into the services and pay entire salary and by way of permanent injunction restrained order to be issued against the defendant from carrying out any recovery of housing loan from the plaintiff. Vide judgment dated 1.10.2004, the learned trial judge was pleased to decree the suit of the plaintiff as regards his relief for declaration holding that termination letter dated 11.8.2000 is bad in law being not in conformity with the terms and conditions of the appointment letter. However the suit for mandatory and perpetual injunction was dismissed in view of the provisions contained in Section 41 of the Specific Relief Act. The learned trial court also awarded one month's salary in lieu of the notice period and three months' salary at the rate last drawn as the nominal damages suffered by the plaintiff. It seems that an appeal is pending adjudication against the said judgment and decree before learned District Judge, Tis Hazari Court, Delhi. However, decree was prepared on 5.7.2006 after plaintiff paid the deficient court fees.

2. Now by way of the present suit, plaintiff has claimed damages for termination of his services for the period from August 2000 when his services were terminated for a period of 74 months i.e. till the date of the filing of the present suit calculated at the rate of Rs. 35,000/-, the gross salary which the plaintiff was allegedly getting at the time of termination of his services.

3. Defendant in its written statement as well as by way of this application has challenged the maintainability of the present suit as according to the defendant, it is barred under the provisions of Order 2 Rule 2 and principle of constructive resjudicata under Section 11 of the CPC.

4. Learned counsel for the applicant/defendant has argued that contract of employment is personal in nature and relief of damages as claimed by the plaintiff in the present suit was available to him when he filed suit for declaration and injunction in the year 2000. Since plaintiff did not claim damages in the said suit he is debarred from claiming damages by way of present suit by virtue of Order 2 Rule 2 and Section 11 of the CPC. He has referred to ***Nandganj Sihori Sugar Co. Ltd.,***

Rae Bareli and another v. Badri Nath Dixit and others – AIR 1991 SC 1525, Emani Venkataramayya and another v. Lalbibi Saheba and others – Air 1935 Madras 90, K.V. George v. The Secrtary to Govt, Water and Power Dept. Trivandrum and another – AIR 1990 SC 53 and Haridas Mondal v. Anath Nath Mittra – AIR 1961 SC 1419 to support his submissions.

5. Learned counsel for the plaintiff has submitted that at the time when the present suit was filed the plaintiff could not have known about the maintainability of his suit for the relief of mandatory and perpetual injunction and therefore, he could not claim damages against the defendant in the said suit. Therefore, it being a distinct relief the present suit is not hit by the provisions of Section 11 and Order 2 Rule 2 CPC.

6. Order 2 Rule 2 CPC reads as follows:

> "2. Suit to include the whole claim.--(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Relinquishment of part of claim.--Where a plaintiff omits to

> sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
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> (3) Omission to sue for one of several reliefs.-- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

7. From careful reading of these provisions, it is obvious that once the plaintiff comes to a court of law for getting relief basing his case on existing cause of action he must include in a suit the whole claim pertaining to the cause of action. If, however, plaintiff gives up a part of the claim pertaining to that cause of action or based on the said cause of action as pleaded in the suit or he omits to sue in connection with the same he is subsequently debarred to resurrect the said claim based on the same cause of action. However, as per sub clause 3 of Rule 2, defendant must show to the Court that the second suit is based on the same cause of action on which the earlier suit was based and if he succeeds in showing that the second suit is based on the same cause of action on which the earlier suit was filed and the plaintiff had not

claimed the relief which was available to him at the time of filing of the earlier suit, he is debarred from claiming such relief by way of a subsequent suit unless he had obtained leave in the first suit for filing another suit for the relief based on the same cause of action from the Court where earlier suit was filed.

8. In the present case, plaintiff neither claimed the relief of damages nor sought any permission under Order 2, sub clause 3 CPC seeking permission to file a suit for damages by way of another suit. Now it has to be seen if the present suit for damages is based on a different cause of action and is independent of the reliefs claimed by the plaintiff in the earlier suit and if the present suit is maintainable as filed. Cause of action has been explained in Halsbury's Law of England (Fourth Edition) in the following manner:

> "'Cause of Action' has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against other person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular

> act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject matter of grievance founding the action, not merely the technical cause of action" (Quoted from AIR 2004 SC 1761).

9. In ***Kunjan Nair Sivaraman Nair v. Narayanan Nair and others – AIR 2004 SC 1761,*** it has been observed:

> "We shall first deal with the question regarding applicability of Order II, Rule 2 of the Code. Said provision lays down the general principle that suit must include whole claim which the plaintiff is entitled to make in respect of a cause of action, and if he does not do so then he is visited with the consequences indicated therein. It provides that all reliefs arising out of the same cause of action shall be set out in one and the same suit, and further prescribes the consequences if the plaintiff omits to do so. In other words Order II, Rule 2 centers round one and the same cause of action."

10. Coming to the facts of this case, the cause of action in the present suit for damages is the same as was the cause of action in suit No. 449/2003 for declaration, mandatory and perpetual injunction. In the said suit, the cause of action was the termination letter dated 11.8.2000. In the present suit also in para 14 of the plaint, plaintiff has averred that cause of action had

accrued in his favour on 11.8.2000 when he was thrown out of job and again on 1.10.2004 when the suit was decided and on 5.7.2006 when the decree was prepared. This Court in its order dated 15.1.2007 observed that the cause of action could not have accrued from the date of judgment or the decree as the decree of declaration merely declared the rights of the parties as they existed at the relevant time. In this case, the decree of declaration with regard to termination of service would relate back to the date of termination. The cause of action in this case arose in favour of the plaintiff only when his services were terminated vide letter dated 11.8.2000. This Court had made these observations while deciding the question of limitation regarding the claim of the plaintiff. Therefore, the cause of action in the earlier instituted suit decided by the learned Civil Judge and the cause of action which is the basis of the present suit are the same.

11. Learned counsel for the plaintiff has referred to ***State of Maharashra and another v. National Construction Company, Bombay and another – (1996) 1 SCC 735*** where a subsequent suit filed for damages for breach of the contract was held as not

barred under Order 2 Rule 2 CPC or Section 11 of CPC. In the said case the first suit was for enforcement of the bank guarantee against the guarantor as the bank guarantee was going to expire and the second suit was for damages for breach of contract. Both the claims being independent of each other, it was held that provisions of Order 2 Rule 2 CPC did not apply to the second suit. Learned counsel for the plaintiff referred to ***Kunjan Nair Sivaraman Nair v. Narayanan Nair and others (supra)*** wherein an earlier suit was filed for a decree for declaration of right and title of plaintiffs to plaint schedule property and their possession. In the first suit the title of the plaintiff was upheld but prayer for injunction was rejected as possession was not found. Subsequent suit was filed for recovery of possession. Under these circumstances, it was held that the second suit was not barred as both the suits were different. Facts of the present case are different and are not covered by any of the above cited two judgments relied upon by the plaintiff.

12. While dismissing the claim of the plaintiff for mandatory and permanent injunction, provisions of Section 41 of the Specific Relief Act were kept in mind by the trial court.

Section 40 of the Specific Relief Act reads as follows:

> "40. Damages in lieu of, or in addition to, injunction.--(1) The plaintiff in a suit for perpetual injunction under section 38, or mandatory injunction under section 39, may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages.
>
> (2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint:
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> Provided that where no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings, allow the plaintiff to emend the plaint on such terms as may be just for including such claim.
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> (3) The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach."

13. Thus, it is clear that the plaintiff in a suit for perpetual or mandatory injunction can claim damages either in addition to, or in substitution for, such injunction and the Court, if thinks fit, may award such damages. The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach. Plaintiff should have claimed the relief of damages in addition to, or in substitution for perpetual injunction or mandatory

injunction as claimed. However, the plaintiff chose not to claim the relief of damages. Now when his suit for perpetual and mandatory injunction has been dismissed, he is debarred from filing the present suit for damages for breach of contract on termination of his services vide letter dated 11.8.2000.

14. In ***Nandganj Sihori Sugar Co. Ltd., Rae Bareli and another v. Badri Nath Dixit and others (supra),*** it was observed that the only relief available to the plaintiff was to claim damages and not specific performance. Similar were the observations made in ***K.V. George v. The Secrtary to Govt, Water and Power Dept. Trivandrum and another (supra)***. Similarly, in ***Percept D'Mark (India) (P) Ltd. v. Zaheer Khan and another – 2006 (4) SCC 227*** it was observed the only remedy available to the plaintiff was to claim damages and not specific performance.

15. In the present case plaintiff who was employed with the defendant on a contract of personal character should have filed a suit for damages as stated above may be in the alternative or in addition to the relief of injunction as claimed. Under these circumstances, I conclude that

present suit of the plaintiff is hit by provisions of Order 2 Rule 2 CPC.

16. As regards Section 11 of the CPC, the principles underlying this provision are different from principles laid down in Order 2 Rule 2 CPC. To invoke Section 11 of the CPC i.e. doctrine of resjudicata, it is required from the plaintiff to exhaust all available grounds in support of his claim while under Order 2 Rule 2 CPC plaintiff is required to include whole of his claim in framing the suit. The principles underlying Section 11 of the CPC is multifarious litigation inter se the parties and not make the defendant to face litigation twice for the same cause of action arising from a transaction. Plaintiff cannot split the cause of action into parts so as to bring separate suits on those separate parts. In ***Daryao v. State of UP - AIR 1961 SC 1457,*** it has been observed:

> "Now, the rule of res judicata as indicated in S. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of

> competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32."

17. The principles of constructive res judicata under the circumstances of this case are in a way applicable to the present case. The defendant cannot be harassed twice over the same cause of action which it faced in the earlier suit for declaration, mandatory and perpetual injunction. Explanation IV read with Section 11 CPC clearly show that a plea which might or ought to have been taken in the earlier instituted suit as a ground of attack or defence, if not taken in the earlier suit should be deemed to have been a matter directly and substantially in issue in the earlier suit and decided against the person raising the same plea in the subsequent suit. Plaintiff in the present suit ought to have taken a plea for claim of damages in the earlier suit but omitted to take the matter of damages in the said suit. Hence the matter in issue in this case is covered by the principles underlying explanation IV to Section 11 of

CPC. Plaintiff was awarded three months' salary as damages by the trial court though plaintiff had not claimed any damages in the earlier instituted suit.

18. In view of my discussion above, I conclude that present suit of the plaintiff is hit by provisions of Order 2 Rule 2 CPC as well as principles of constructive res judicata. Hence, suit of the plaintiff is hereby dismissed. There are no orders as to cost. File be consigned to record room.

(ARUNA SURESH)
JUDGE

November 19, 2007
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